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No. 96-1928

In The

Supreme Court of the United States

October Term, 1997

LOWER BRULE SIOUX TRIBE,

Petitioner,

v.

STATE OF SOUTH DAKOTA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER SOUTH DAKOTA MAY EXERCISE JURISDICTION OVER NONMEMBER RECREATIONAL ACTIVITIES ON CORPS OF ENGINEER LANDS TAKEN FOR DAMS AND RESERVOIRS UNDER THE FLOOD CONTROL ACT OF 1944, CH. 665, 58 STAT. 887, WITHIN THE LOWER BRULE RESERVATION?

II. WHETHER THE *MONTANA* EXCEPTIONS REQUIRE CLARIFICATION AS APPLIED TO ACTIVITIES OF THE GENERAL PUBLIC WITHIN THE TAKEN AREAS OF THE LOWER BRULE SIOUX RESERVATION?

III. WHETHER THE *MONTANA* DECISION SHOULD APPLY TO FORMER ALLOTTED LANDS NOW OWNED IN FEE BY NON-INDIANS WITHIN THE EXTERIOR BOUNDARIES OF THE LOWER BRULE RESERVATION?

IV. WHETHER SUMMARY JUDGMENT IS APPROPRIATE FOR INDIAN JURISDICTION CASES?

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STATEMENT OF THE CASE

This case stems from an action brought by the Petitioner Lower Brule Sioux Tribe on August 4, 1980, almost 17 years ago, seeking to enjoin the State of South Dakota from enforcing its fish and wildlife regulations within the exterior boundaries of the Lower Brule Reservation. The district court initially determined that the reservation had been diminished by the acts of Congress which took land for the construction of two main stem dam and reservoirs on the Missouri River. *Lower Brule Sioux Tribe v. South Dakota*, 540 F.Supp. 246 (D.S.D. 1982). The United States Court of Appeals for the Eighth Circuit reversed and remanded the issue of whether the Tribe had jurisdiction over nonmembers within the "taken areas." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 827 (8th Cir. 1983). Prior to the trial scheduled by the district court, the State and the Tribe entered into a five-year agreement and the case was dismissed.

1. At the end of the five-year agreement, on October 24, 1991, the Tribe brought the present action to preliminarily and permanently enjoin the State from enforcing its hunting and fishing laws within the exterior boundaries of the reservation over any persons, Indian or non-Indian, and seeking a determination that barred the State from exercising any hunting and fishing authority within the boundaries, whether on fee land, public land, or trust land. DCO App. 23a.[1] The district court held an evidentiary hearing on November 8, 1991, on the issue of

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[1] The term "App." refers to the Appendix filed as part of the Tribe's petition.

preliminary injunctive relief. DCO App. 24a. On November 13, 1991, the district court entered a preliminary injunction which continued, in some respects, the terms of the five-year agreement between the State and the Tribe.

Over the course of the next several years, both the State and the Tribe conducted extensive discovery. App. 3a. On September 11, 1995, the State filed a motion for summary judgment requesting the court to find that the State has exclusive jurisdiction over nonmember Indians and non-Indians hunting and fishing on the non-Indian fee lands and waters within the boundaries of the reservation and within the Fort Randall and Big Bend taken areas, as well as the lands and waters owned in fee by any nonmember Indian. DCO App. 25a; T.A. 10.[2]

The Tribe on January 15, 1996, submitted a response to State's Statement of Material Facts and a brief in opposition to the motion for summary judgment. T.A. 16. The district court thereafter entered an order granting the State's motion for summary judgment finding the State possessed exclusive hunting and fishing jurisdiction over all nonmembers on fee and public lands within the Lower Brule Reservation. DCO App. 20a-63a.

2. The court of appeals affirmed. App. 1a-19a. The majority affirmed the district court's granting of summary judgment and held that the State of South Dakota has exclusive regulatory jurisdiction over hunting and fishing by nonmembers on both nonmember-owned fee

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[2] The term "T.A." refers to the Tribal Appendix compiled in the Court of Appeals.

lands and the taken area within the Lower Brule Reservation. App. 15a. "We agree with the district court that under existing precedent summary judgment is appropriate to resolve this dispute." App. 6a.

The court of appeals then analyzed the Tribe's jurisdiction over fee lands and waters under its treaty rights, App. 7a-8a, and under notions of inherent sovereignty. App. 8a-11a. After an extensive analysis guided by this Court's decisions, the Court held "that the district court did not err in its determination that the Tribe failed to establish sufficient evidence to prevent summary judgment on the jurisdictional issue over nonmember-owned fee lands and waters." App. 11a. The Court found that since the Tribe no longer retained the exclusive use and benefit of the fee lands and could not exclude persons therefrom that it had lost regulatory jurisdiction over the use of the lands by others. App. 8a. The court of appeals then conducted a similar analysis for the lands and waters located in the Fort Randall and Big Bend taken areas within the boundaries of the reservation. App. 11a-14a.

3. The Tribe applied for rehearing and rehearing en banc. The core of the Tribe's argument was that summary judgment was not a proper procedure in a tribal jurisdiction dispute and that it should have gotten its day in court. Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc, *Lower Brule Sioux Tribe v. State of South Dakota, et al.*, No. 96-1692. Rehearing was denied and of the eleven active judges, three would have granted rehearing en banc. App. 64a.

4. The Lower Brule Sioux Reservation was created by an Act of Congress on March 2, 1889, 25 Stat. 888, which divided the Great Sioux Reservation into several parts. App. 4a; DCO App. 25a. The reservation is located in northeastern Lyman County with a small portion in the southeastern corner of Stanley County. It is bounded on the northeast and east by the Missouri River. DCO App. 25a-26a.

The Lower Brule Reservation has been twice diminished, first by the Act of March 3, 1899, 30 Stat. 1362, and next by the Act of April 21, 1906, 34 Stat. 124. App. 4a; DCO App. 27a. The present reservation consists of approximately 235,800 acres. App. 4a, DCO App. 27a. Approximately 56,634 acres of this land constitute the fee lands which the Tribe wishes to exercise jurisdiction over by virtue of this litigation. *Id.*

The Tribe also wishes to exercise jurisdiction over nonmembers on an additional 22,296 acres of lands and waters acquired for construction of the Big Bend and Fort Randall Dams and their associated reservoirs. App. 5a; DCO App. 28a. The lands for the two reservoirs were acquired pursuant to the Flood Control Act of 1944 which provided that all flood control projects " 'shall be open to public use generally,' " and that there be " 'ready access to and exit from such water areas . . . for general public use.' " *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (quoting 16 U.S.C. § 460d); App. 71a. The *Bourland* court pointed out that the Flood Control "Act also clearly prohibits any 'use' of the lands 'which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.' " *Id.* at 690 (quoting 16 U.S.C. § 460(d)); App. 71a.

The lands for the Fort Randall Dam and Lake Francis Case Reservoir were acquired pursuant to Pub. L. No. 85-923, 72 Stat. 1773 (Sept. 2, 1958), S.A.II.B.5[3], which provided that the Tribe maintained only the right to graze stock on the lands in question and a right of access for hunting and fishing. App. 5a; DCO App. 28a, 53a-54a. The taking for the Big Bend Dam and Lake Sharpe reservoir was pursuant to Pub. L. No. 87-734, 76 Stat. 698 (Oct. 3, 1962), S.A.II.B.4. App. 5a; DCO App. 28a, 54a. In this transaction, the United States acquired the "entire interest" of the Tribe, including gravel and any interest the Tribe "may have within the bed of the Missouri River" (but excluding oil, gas, and mineral interest). Further, the Tribe, as with Fort Randall, was allowed to exercise a grazing right and free "access for hunting and fishing." DCO App. 54a.

REASONS FOR DENYING THE PETITION

The Lower Brule Sioux Tribe presents four general arguments for granting the petition. An examination of the four tribal positions indicates that the lower courts correctly decided the issues presented to them by applying precedent established by this Court.

[3] The term "S.A." refers to the State's Appendix compiled in the Court of Appeals.

ARGUMENTS

I.

CERTIORARI NEED NOT BE GRANTED TO APPLY WELL ESTABLISHED LAW TO THE QUESTION OF WHETHER SOUTH DAKOTA MAY EXERCISE CIVIL REGULATORY JURISDICTION OVER NONMEMBERS WITHIN THE AREAS ACQUIRED FOR THE MISSOURI RIVER RESERVOIRS.

The question of whether the State of South Dakota may exercise civil regulatory jurisdiction over nonmembers on lands and waters acquired in fee by the United States for the Missouri River reservoirs adjoining the Lower Brule Reservation is well settled.

This analysis begins with the unremarkable proposition that the states have general civil regulatory authority over fish and game within their borders, barring a conflict with the Constitution or federal law. *See generally Geer v. Connecticut*, 161 U.S. 519, 528 (1896). *See also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring in part and dissenting in part); *Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). The question which arises, therefore, is whether that state authority has been "preempted by federal law," or whether the exercise of state authority infringes upon " 'the right of reservation Indians to make their own laws and be ruled by them.' " *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). As *White Mountain Apache Tribe*, 448 U.S. at 143 holds, either of the barriers can be a "sufficient basis for holding state law inapplicable to activity undertaken on the reservation." This Court

has noted that when the State asserts authority over non-Indians engaging in activities on the reservation:

> we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-145. The record demonstrates that the courts below correctly found state law not to be preempted.

The first critical indicator that Congress did not preempt the law of the state is found in the Flood Control Act of 1944, the generic authority under which the reservoirs adjoining the Lower Brule Reservation were built. As the court of appeals found:

> It is apparent from the language of the Flood Control Act of 1944 that Congress did not preempt state law. The Act provides: "No use of any area to which [the Flood Control Act] applies shall be permitted which is inconsistent with the laws for the protection of fish and game *of the State in which such area is situated.*" 16 U.S.C. § 460d.

App. 13a (emphasis by the Court). *See also* DCO App. 58a. Thus, the Flood Control Act, by forbidding activity "inconsistent" with state fish and game law, clearly *deferred to* state law and did not attempt to preempt it.

Furthermore, the two acts by which the United States acquired lands of the Tribe and its members to build the Fort Randall and Big Bend Reservoirs adjoining the Reservation likewise indicate a deference to state law. As the court of appeals pointed out:

> both the Fort Randall and Big Bend Taking Acts grant tribal members permission to hunt and fish within the taken areas, 'subject, however, to regulations governing the corresponding use by other citizens of the United States.' Fort Randall Taking Act, § 5; Big Bend Taking Act, § 10. This language recognizes that other regulations may impact the lands. *See Bourland III*, 508 U.S. at 691. In light of the fact that there are no comprehensive federal hunting and fishing regulations in effect for the taken areas, we agree with the district court's observation that this language indicates that Congress anticipated that the federal government would rely heavily on state regulation.

App. 13a; *see* DCO App. 58a.

Not only does the statutory authority unequivocally indicate that Congress intended to defer to, and not preempt, state law, the United States government has implicitly articulated that position. On September 15, 1986, for example, Colonel Steven West, the district engineer for the Corps of Engineers, wrote:

> [R]egulation of hunting and fishing on Corps project lands in South Dakota is a matter of State law. This was clearly the intent of Section 4 of the 1944 Flood Control Act. . . . As you know, the Corps has only proprietal jurisdiction over

> its project lands along the mainstem of the Missouri River in South Dakota. Such lands are subject to state civil and criminal jurisdiction.

App. 14a. Similarly, a representative of the Corps of Engineers informed Congress in 1987 that:

> Senator, it is my understanding that, in this instance, *we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas*. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies. . . . We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

DCO App. 60a (quoting U.S. Senate Hearing 100-500, Nov. 19, 1987) (emphasis added by the court) (testimony of John Velehradsky, Chief of the Planning Division of Missouri River Division, COE).

Finally, as the court of appeals pointed out, the rules of the Corps of Engineers published in the Code of Federal Regulations "likewise provide for application of state laws." App. 14a.

The weighing of the respective interests clearly favors state jurisdiction under *Bracker*. The state's interest in assuring that nonmembers are subjected to regulation only by a government in which they may participate is relevant as is the state interest in protection of its extensive investment of time and energy. DCO App. 50a. For example, after the reservoirs were closed, the State stocked between five and six million fry, fingerlings, and catchable fish in Lake Francis Case and between four and

five million fry, fingerlings, and catchable fish in Lake Sharpe. Ex. 207 at 3, 4; Ex. 385; Ex. 526 at 16-17; Ex. 527 at 15. *See also* S.A.II.A.1, 3, 5, 7, 9-12; II.B.1-3. The Tribe does not seriously argue here that it has the authority to regulate nonmembers in the area. Nor can it argue a history of extensive activity as to the Corps of Engineers lands. *See, e.g.*, S.A.II.A.3, ¶¶ 11-13; II.A.5, ¶¶ 10-11; II.A.7, ¶¶ 6, 7, 12-13; II.A.9, ¶¶ 16, 19. The federal interest in state regulation is clear from the studied deference of the federal statute and regulation to state law. Finally, we note that because the Tribe lacks the authority to regulate nonmembers in the area and the federal statutes defer to the state, it is in the joint interest of the Tribe and federal government that the State exercise its own jurisdiction to protect the natural resources at stake. *See* DCO App. 50a. The relevant principles of law thus overwhelmingly indicate that state law is not preempted.

The Tribe implicitly admits that it cannot overcome the foregoing argument and, instead, suggests that what actually occurred was that Congress unconstitutionally *granted* to the Corps authority to confer upon the state the power to regulate nonmembers on the taken area. *See* Petition For Certiorari, p.9. The action was unconstitutional, reasons the Tribe, as a violation of the "nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160 (1991)." Petition at 10. The Tribe also suggests that the action of

Congress violated the Tenth Amendment because it commandeered the State of South Dakota "to enact and enforce a federal regulatory program." Petition at 12.

The Tribe's analysis is misplaced. Congress did not *grant* legislative authority to the states; instead, *Congress declined to preempt state law* as set forth above. We acknowledge, of course, that while certain language in the Court of Appeals' Opinion refers to a lack of preemption, other language states that the Corps of Engineers "delegated" authority to the State. *See, e.g.*, App. 14a. Read in context, however, this "delegation" language simply refers in an imprecise way to the lack of federal preemption.

In any event, the statutes actually demonstrate an intent not to preempt the authority of the State and not an intent to delegate authority to the State.[4] Of course, if the Court below incorrectly relied on a delegation theory, which we do not concede, it nonetheless came to the right result and a grant of certiorari is unnecessary to correct the decision. *See United States v. New York Telephone Company*, 434 U.S. 159, 166 (1977).

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[4] Petitioner's Tenth Amendment argument is thus essentially irrelevant because it is contingent upon the delegation theory. Furthermore, Petitioner's Tenth Amendment argument should be rejected because it was not properly raised below, *see Youakim v. Miller*, 425 U.S. 231, 233 (1976), and because the "delegation" theory upon which it premised contemplates a statutory construction which unnecessarily raises constitutional problems. *See United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464, 472 (1994).

II.

IN THE AREA OF HUNTING AND FISHING REGULATION, THIS COURT HAS ESTABLISHED THE NECESSARY ANALYSIS TO DETERMINE WHO REGULATES NONMEMBER ACTIVITIES WITHIN TAKEN AREAS OF THE LOWER BRULE SIOUX RESERVATION AND NO FURTHER CLARIFICATION IS NEEDED.

The Tribe argues that its Petition for Certiorari should be granted because this Court in *South Dakota v. Bourland*, 508 U.S. 679 (1993) did not determine whether tribes could regulate the terms and conditions of ingress and egress or whether tribes could regulate the impacts from the taken area onto trust lands or onto fee lands. Petition at 13. The Tribe urges this Court to accept certiorari so it can further define and clarify the two exceptions set out in *Montana v. United States*, 450 U.S. 544 (1981).

This Court has, however, sufficiently clarified and defined the two *Montana* exceptions. This is especially true in the area of hunting and fishing regulation.

Montana involved a dispute between the Crow Tribe and the State of Montana regarding the licensing and regulation of nonmember hunters and fishers within the Crow Reservation. The *Montana* court first analyzed the treaties between the United States and the Crow Tribe. Under the 1868 Fort Laramie Treaty, 15 Stat. 649, the Crow Tribe received a reservation which was "set apart for the absolute and undisturbed use and occupation of the Indians herein named," and prohibited unauthorized persons from passing over, settling upon, or residing within the reservation. *Montana*, 450 U.S. at 558.

> The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Id. at 558-59 (footnotes omitted). After determining that the Tribe lacked a treaty right to regulate nonmember hunting and fishing on non-Indian fee lands, this Court found that the Tribe lacked the authority to regulate the activities under its inherent sovereignty

> [s]ince regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations. . . .

Id. at 564 (footnote omitted). This Court then went on to develop what are commonly known as the two *Montana* exceptions.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,

> even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (Citations omitted.) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66. This Court found that neither exception applied because non-Indian hunters and fishers on non-Indian fee lands did not enter into a consensual agreement with the Crow Tribe and nonmember hunting and fishing on non-Indian fee lands did not threaten the tribe's political or economic security so as to justify tribal regulation. *Id.* at 566. The two *Montana* exceptions were explicated by this Court's plurality decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

South Dakota v. Bourland, 508 U.S. 679 (1993) further clarified *Montana* in a context which is virtually indistinguishable from the case now before this Court. In *Bourland*, this Court determined that the Cheyenne River Sioux Tribe lacked treaty authority to regulate nonmembers hunting and fishing on taken lands owned by the Corps of Engineers which were acquired for the construction of the Oahe Dam and Reservoir under the Flood Control Act of 1944, *id.* at 689-90, and remanded for determination of the application of the *Montana* exceptions.

On remand, the court of appeals affirmed the district court's decision that the Cheyenne River Sioux Tribe could not regulate the hunting and fishing activities of nonmembers on the Corps taken lands under *Montana. South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994).

Recently, this Court again defined and clarified the application of the two *Montana* exceptions. *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S.Ct. 1404 (1997). "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Id.* at ___, 117 S.Ct. at 1409. This Court noted "that in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers" if a tribe shows one of the two *Montana* exceptions exist. *Id.*

> *Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare.

Id. at ___, 117 S.Ct. at 1409-10. This Court set forth a detailed analysis of the two *Montana* exceptions. In analyzing the second exception as applied to the case before it, this Court stated:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation

> endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.

Id. at 1415. This Court then analyzed previous decisions to illustrate when the second exception may apply, thus further defining and clarifying the second *Montana* exception.

Brendale, Bourland, and *Strate* have defined and clarified the scope of the two *Montana* exceptions, and the Tribe has not shown any inadequacy in the definitions. This is especially true concerning the regulation of hunting and fishing within a reservation area.

III.

ONCE THE LOWER BRULE SIOUX TRIBE LOSES THE RIGHT TO EXCLUDE OTHERS FROM A TRACT OF LAND, IT LOSES THE INCIDENTAL POWER TO REGULATE THE CONDUCT OF NONMEMBERS ON THAT TRACT.

A. The method of alienation of Indian trust land is unimportant.

The Tribe urges the granting of its Petition because "[t]he Supreme Court's review of the effects of allotted lands passing into deeded ownership will promote the administration of government within the Reservation" and argues that, since the diminished Lower Brule Sioux Reservation was never opened for non-Indian homesteading, its case may be distinguished from *Montana* and *Bourland*. Petition at 15.

This Court's decisions make it clear that the method of alienation is unimportant. Once a tribe loses the ability to exclude others from a tract of land, it also loses the lesser right to regulate the conduct of nonmembers on that land. *Montana v. United States*, 450 U.S. 544, 558-59 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 425 (1989); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S.Ct. 1404, 1414 (1997); *also see County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 253-54 (1992).

> *Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions[.]

Strate, ___ U.S. ___, 117 S.Ct. at 1409-10. The authority to regulate nonmember conduct, absent one of the two *Montana* exceptions, only extends to land on which the tribe exercises " 'absolute and undisturbed use and occupation.' " *Montana*, 450 U.S. at 559.

Petitioner argues that *Montana* and *Bourland* should not apply since the unallotted lands within the reservation were never declared surplus and opened to non-Indian homesteading. This Court's decisions clearly show that the method of alienation of tribal lands is unimportant. The only controlling factor is whether the tribe can exclude others from a tract of land as this Court has determined:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of

> absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

Bourland, 508 U.S. at 689.

As *Bourland* points out, regardless of the method used, once the Tribe lost its treaty right of unimpeded use and occupation, it also lost the basis for tribal exercise of the lesser included power to regulate. *Id.* at 691. "Certainly, the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11.

Even if a tract of land is trust land, the tribe may lose the right to regulate if it has lost the right to exclude others from that trust land. In *Strate*, this Court determined that a right-of-way the State of North Dakota acquired for a state highway over a stretch of trust land was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at ___ U.S. ___, 117 S.Ct. at 1413 (footnote omitted). Because the right-of-way was open to the general public and the tribe had lost the ability to exclude others from it, this Court held that

Montana, and its progeny, governed the case. *Id.* at ___ U.S. ___, 117 S.Ct. at 1414.

As clearly demonstrated by the decisions of this Court, the method of alienation of former Indian lands is unimportant. The fact that the Lower Brule Reservation was never opened for non-Indian homesteading makes no difference to the outcome of this matter. As both of the courts below correctly pointed out, the controlling factor is the Tribe's loss of the ability to exclude others from the non-Indian fee lands and Corps of Engineers' taken lands and waters.

B. The fee lands and taken lands and waters within the Lower Brule Sioux Reservation are not "closed areas."

Petitioner argues that the lands within the Lower Brule Reservation should be considered a "closed area" and that Justice Stevens' opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 426, 433 (1989) should control. Petition at 14. The Lower Brule Reservation, however, is nothing like the 807,000-acre closed area within the Yakima Reservation. The Tribe, for example, does not contend that it has established a "closed area" or restricted access to or movement through any part of the reservation; nor could it make such a contention. *See Brendale*, 492 U.S. at 438. *See generally* S.A.II.A.12.

Further, this Court has made it clear that the Corps of Engineers' project lands are not "closed areas."

> The District Court found that the taken area is not a "closed" or pristine area, and the Court of

> Appeals did not disturb that finding. We agree that the area at issue here has been broadly opened to the public.

Bourland, 508 U.S. at 689 n.9 (citation omitted). Finally, *Strate* does not make the *Montana* rule contingent on an "open-closed" distinction. This Court's decisions, as properly applied by the courts below, appropriately define how jurisdiction over the lands in question should be determined. Both the district court and court of appeals properly applied these decisions.

IV.

FEDERAL LAW FAVORS THE GRANT OF SUMMARY JUDGMENT IN APPROPRIATE CASES.

The Tribe argues that summary judgment is not appropriate "in cases involving the determination of jurisdiction in Indian country where jurisdiction is based upon the complex mix of relevant facts." Petition at 19. The Tribe cites no direct authority for this proposition.

This Court, in a trilogy of cases, has indicated the critical role of summary judgment in securing a determination of actions which is just, speedy, and inexpensive both with regard to the persons asserting claims and those disputing them. In *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986), this Court found:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

This Court's emphatic declaration of the increased value of summary judgment has arisen from the improvement in pleading practices, *id.* at 327, and in discovery, *see, id.* at 322; in view of these developments, this Court set a heavier burden on a party opposing summary judgment than it had recognized in prior cases.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986), this Court determined that summary judgment was appropriate if there is no "genuine issue for trial" in a factually complex antitrust, unfair competition, and illegal conspiracy case concerning the television receiver industry. Following the 1963 amendment to Rule 56(e), the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Id.* at 587 (quoting Advisory Committee's Note to 1963 Amendment of Fed. Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626).

One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims. *Celotex Corp.*, 477 U.S. at 323-24. "[W]e think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 324.

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element

> of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23. Summary judgment, like motions to dismiss a complaint or strike a defense, is designed to prevent the unwarranted consumption of public and private resources. *Id.* at 327.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. Summary judgment, in this case, has fulfilled that purpose.

When determining if summary judgment should be granted, the district court judge must determine if a genuine issue for trial exists. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The Tribe had to do more than merely show a dispute of facts. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. The Tribe could not demonstrate genuine issues of material facts which would have required this matter to go through a

lengthy trial process. Indeed, no such issue is identified for this Court. As both courts below pointed out, no genuine issue of material fact existed which would have required this matter to go to trial. App. 6a n.1; DCO App. 31a-32a.[5]

As demonstrated by this Court's trilogy of cases, summary judgment is proper in complex cases including cases involving jurisdictional disputes between a state and a tribe.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[5] The Tribe does not allege that it has not had a fair opportunity to conduct proper discovery in this matter. In fact, as the court of appeals pointed out, both parties carried out extensive discovery prior to the filing of the State's Motion for Summary Judgment. App. 3a. *See Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 250 n.5 (1986).